UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Asociacion de Empleados del Estado Libre Asociado de Puerto Rico,

Respondent Employer,

and

Case No. 12-CA-218502 & Case No. 12-CA-232704

Union Internacional de Trabajadores de la Industria de Automoviles, Aeroespacio e Implementos Agricolas, U.A.W. Local 1850,

Charging Party Union.
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CHARGING PARTY UNION'S MOTION FOR RECONSIDERATION AND/OR CLARIFICATION OF BOARD DECISION

Charging Party Union Internacional de Trabajadores de la Industria de Automoviles, Aeroespacio e Implementos Agricolas, U.A.W., Local 1850 (the "Charging Party Union") moves for reconsideration and/or clarification of the Labor Board's January 14, 2021 Decision and Order (the "Decision") in this case, and says in support:

A. INTRODUCTION

1. By purporting to definitively interpret the Christmas bonus provisions of the underlying labor agreement against the Charging Party Union in this case, rather than confining itself to applying the "sound arguable basis" analysis established in *Bath Iron Works, Corp.*, 345 NLRB 499 (2005)("*Bath Iron"), affirmed, Bath Marine Draftsmen's*

Association v. NLRB, 475 F.3d 14 (1st Cir. 2007)("*Bath MDA*")[1], the Decision of the Board majority here improperly interferes with the right of the Charging Party Union to pursue LMRA Section 301(a) claims against the Respondent in federal or Puerto Rico courts of competent jurisdiction.[2] The Decision here claims to rely on the precedent and reasoning of *Bath Iron*. In fact, it flagrantly ignores that precedent, to the prejudice of the Charging Party and its members, as we now show.

B. RELEVANT LEGAL PRINCIPLES

2. In *Bath Iron*, the Board (over the dissent of Member Liebman) defined the "sound arguable basis" analysis it said is required when the Board is faced with a Section 8(d) contract modification claim. Thus, the *Bath Iron* majority held that in Section 8(d) cases turning on:

> "two conflicting interpretations of the … CBA …, [w]here an employer has a 'sound arguable basis' for its interpretation on a contract and is not 'motivated by union animus or … acting in bad faith,' the Board ordinarily will not find a violation. … In such cases, there is, at most, a contract breach, rather than a contract modification." (Id. at 502, citations omitted).

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[1] Since the instant case arose in the Commonwealth of Puerto Rico, the *Bath MDA* Court is the relevant appellate circuit with respect to the instant matter.

[2] The collective bargaining agreement in this case provides that "[a]ll salary claims that emerge under this Collective Bargaining Agreement or applicable legislation and the general salary rates, shall not be subject [to] the Arbitration Procedure set forth herein, since the parties expressly agree that arbitration shall be substituted by the Court of competent jurisdiction." (Joint Exhibit 4(b), Article 27, subpart I.) Thus, any claim by the Charging Party Union that the Employer has breached the underlying labor agreements by shorting employees on their Christmas bonuses (as distinct from any NLRA unfair labor practice claim regarding the same) may be brought directly to federal district court under LMRA Section 301(a) or to the courts of the Commonwealth of Puerto Rico. See *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962); *Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962)(state courts have concurrent jurisdiction over claims within the purview of Section 301(a), but such courts are to apply federal substantive law as developed under Section 301(a)).

3. The Board majority in *Bath Iron* further held that in applying the "sound arguable basis" test in Section 8(d) contract modification cases, "[w]e do not pass on which of the[] contract interpretations is the better view; the arbitration process and the courts are well equipped to deal with those matters…" (Id. at 503). And, as the *Bath Iron* Board majority also instructed, even where an unlawful Section 8(d) midterm modification unfair labor practice is not found by the Board:

> "In addition, the victim of the alleged contract modification has the option of proceeding to arbitration and pursuing an action under Section 301 of the Labor-Management Relations Act, 29 U.S.C. 185. *Mere proof of breach of contract will permit the victim to prevail in those forums.* (Id., emphasis supplied.)

4. In affirming *Bath Iron*, the First Circuit in *Bath MDA* further explained the basis for the Board majority's decision. The Court first explained that "in order to stabilize collective bargaining agreements, the 1947 version of the NLRA, the Labor Management Relations Act (LMRA), enacted both "'the provisions in 8(d) and 301(a) to prohibit unilateral mid-term modifications and terminations of CBAs and to confer federal jurisdiction over suits for contract violations." *Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 186 (197)." *Bath MDA,* 475 F.3d at 20. Further, the Court said that "[i]t is clear that 8(d) is not meant to confer on the Board broad powers to interpret CBAs. In enacting 301, Congress determined 'that the Board should not have general jurisdiction over all alleged violations of collective bargaining agreements and that such matters should be placed within the jurisdiction of the courts.' [*NLRB v.*] *C & C Plywood,* 385 U.S. [421,] 427 [(1967)](footnote omitted)." *Bath MDA,* 475 F.3d at 20-21.

And, with respect to the limits of the Board's authority to interpret collective bargaining agreements, the Court explained that:

> "Under *C & C Plywood*, the Board does have some authority to construe collective bargaining agreements when raised by the employer as a defense to an unfair labor practice charge. 385 U.S. at 428. But in *Litton* [*Fin. Printing Div. v. NLRB*], [501 U.S. 190 (1991)], the Supreme Court stressed that "[a]lthough the Board has occasion to interpret collective bargaining agreements in the context of unfair labor practice charges, *the Board is neither the sole nor the primary source of authority in such matters. 'Arbitrators and courts are still the principal sources of contract interpretation.' Section 301 of the [LMRA] 'authorizes federal courts to fashion a body of federal law for the enforcement of … collective bargaining agreements.'* 501 U.S. at 202 (omission in original)(citations omitted)(quoting *NLRB v. Strong*, 393 U.S. 357, 360-61 (1969); *Textile Workers v. Lincoln Mills of Ala.*, 353 U.S. 448, 451 ((1957)(emphasis added)."

Bath MDA, 475 F.3d at 21 (emphasis supplied).

5. As the First Circuit also explained, it was in *Vickers, Inc.*, 153 NLRB 561 (1965), that the Board articulated the reasons for the "sound arguable basis" test in Section 8(d) midterm modification cases. As quoted by the Court, the *Vickers* Board held:

> "The Board is not the proper forum for parties seeking an interpretation of their collective-bargaining agreement. Where, as here, an employer has a sound arguable basis for ascribing a particular meaning to his contract and his action in accordance with the terms of the contract as he construes it, and there is 'no showing that the employer in interpreting the contract as he did, was motivated by union animus or was acting in bad faith,' *the Board ordinarily will not exercise its jurisdiction to resolve a dispute between the parties as to whether the employer's interpretation was correct.* 153 NLRB 561, 570 (1965)(footnotes omitted)."

Bath MDA, 475 F.3d at 22 (emphasis supplied).

6. Later in its decision, the *Bath MDA* Court summarizes its view of the role of the Board where, as here, the resolution of a Section 8(a)(5) case depends solely on contract interpretation:

> "[If t]he unfair labor practice determination depends solely on the interpretation of the contract in place, [ ] the appropriate standard for the Board is the sound arguable basis standard. *See NCR Corp.*, 271 NLRB [1212,] at 1213 (1984). *The Board has only limited authority to interpret labor contracts and should not act as an arbitrator in contract interpretation disputes.* This framework is consistent with the NLRA and the *NCR Corp.* line of Board cases. *It preserves for the courts and arbitrators the authority to interpret labor contracts…*"

475 F.3d at 25 (emphasis supplied).

C. THE BOARD MAJORITY DECISION FAILS TO FOLLOW THE FOREGOING LEGAL PRINCIPLES

7. In its Decision here, the Board majority arrogates to itself the contract interpretive role that the foregoing precedent instructs the Board to eschew. The Board must correct this error.

8. As the *Bath MDA* First Circuit instructs, the "sound arguable basis" test means above all else that "the Board should not act as an arbitrator in contract interpretation disputes [but should instead] preserve[] for the courts and arbitrators the authority to interpret contracts." 475 F. 3d at 25. The Board majority in this case ignored this central command of its "sound arguable basis" standard and instead did just the opposite. To wit: "There are not two equally plausible interpretations here. There is only one plausible interpretation, and it favors the Respondent." Decision at 4. See also Decision at 2.

9. As we now show, the Charging Party Union is prejudiced by this failure of the Board majority to follow these principles.

D. THE REFUSAL OF THE BOARD MAJORITY TO FOLLOW ITS OWN "SOUND ARGUABLE BASIS" STANDARD UNLAWFULLY PREJUDICES THE CHARGING PARTY UNION AND ITS MEMBERS

10. Under the legal principles outlined in Part B above, the "authority to interpret labor contracts" – and the right of the Charging Party Union and its members to pursue breach of labor contract claims against their employer – must be "preserve[d] for the courts and arbitrators…" 475 F.3d at 25. That is precisely the reason the Board has established the "sound arguable basis" standard in the way that it has. As the Board held in *Bath Iron*: "the victim of the alleged contract modification has the option of proceeding to arbitration and pursuing an action under Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185. *Mere proof of breach of contract will permit the victim to prevail in those forums*." 345 NLRB at 503 (emphasis supplied.)

11. The Board majority here ignored this cardinal principle in the most blatant way: it ignored the contrary reasoning of its ALJ and of the dissenting Board Member and held that "there is only one plausible interpretation" of the contract here. In doing so, the Board majority has acted to foreclose even the Union's "mere proof of breach of contract" remedy that Congress preserved to Article III adjudication under LMRA Section 301(a).

12. This attempt at such foreclosure by the Board majority interferes with the right of the Union and its members to pursue a Section 301(a) claim against the Respondent both as to the 2017 and 2018 Christmas bonuses. Thus, the record here makes clear that the 2013-2017 labor agreement was in fact in force on Christmas Day 2017, since the contract parties agreed on December 21, 2017 that the contract would be in force from

that date going forward through at least January 31, 2018. See Joint Exhibit 5(a) and (b). This alone presents a colorable basis for the bringing of a Section 301(a) claim against the Respondent for its failure to pay the full Christmas bonus that the Union has claimed is due. Simply put, there was a labor contract in force on Christmas Day 2017 and that labor contract called for a Christmas bonus, the contractual amount of which is in dispute between the contracting parties.[3]

13. If that were not enough of a basis to proceed under Section 301(a) as to the Christmas 2017 bonus, federal court precedent also recognizes that Section 301(a) litigation can also be brought by a Union alleging a breach of an "implied-in-fact collective bargaining agreement" between it and an employer that can be said to exist during a non-extension period, such as that which preceded December 21, 2017 extension here. See *McNealy v. Caterpillar, Inc.*, 139 F.3d 1113, 1120-1124 (7th Cir. 1998)(discussing cases). The argument made pursuant to Section 301(a) would rely, *inter alia*, on arbitral and other precedents relevant under Section 301(a). Those arguments and precedents would be judged under Section 301(a) to determine whether -- in the words of the *Bath Iron* Board – they established a "*mere proof of breach of contract*."[4]

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[3] The 2017 Christmas bonus was contractually based on hours worked from October 1, 2016 through September 30, 2017 (Joint Exhibit 4(b), Article 41). During that entire period, there is no dispute that the 2013-2017 agreement was in place. Thus, the Christmas bonus was fully earned before any arguable contract hiatus. And given the fact that the labor agreement was again extended on December 21, 2017 – to a date including and after Christmas 2017 – the Union may even more strongly argue under LMRA Section 301 that the Christmas bonus in the amount it has sought is *contractually* due.

[4] *Bath Iron* explained its rationale for this distinction between NLRA and LMRA Section 301(a) labor adjudication thus: "Since the remedy for a [Section 8(d)] contract modification is more severe, it is reasonable to require greater proof … [than] *[m]ere proof of breach of contract*." 345 NLRB at 503 (emphasis supplied).

14. As for the 2018 Christmas bonus, since there is no dispute that there was an extension of the labor contract in place from September 8, 2018 through the end of 2018 (Joint Stipulation of Facts ¶14), there can be no doubt that Section 301(a) jurisdiction would lie as to a breach of labor contract claim for underpayment of the Christmas 2018 bonus. Moreover, although ignored by the Board majority (but not the ALJ), the record discloses that the employer here asserts that it subsequently paid the 2018 Christmas bonus at the level the Union claimed was due, but did so only in September 2019, belatedly and without interest. (See Respondent's October 16, 2019 "Informative Motion", subsequently withdrawn on November 1, 2019.) While full compliance was not established to the satisfaction of the ALJ (see ALJD, n. 7), any such action by an employer is relevant to any Section 301(a) claim that may be brought. For as has been recognized as a cardinal principle of contract interpretation since at least the 19th century, a party's performance with respect to a contract issue is clear evidence of the meaning of that contract. See, among many others, *United House of Prayer v. Therrien Waddell, Inc.*, 112 A.3d. 330, 343 (D.C. 2015)("there is no surer way to find out what parties meant, than to see what they have done."); *Vacold LLC v. Cerami*, 545 F.3d 114, 123 (2d Cir. 2008)(quoting same); *Brooklyn Life Ins. Co. v. Dutcher,* 95 U.S. 269, 273 (1877)(source of quoted language).

15. The Board here improperly ignored its own precedent and encroached on LMRA Section 301(a) jurisdiction when it found "only one plausible interpretation" of the contract. It is LMRA Section 301(a) courts which have the power to pass on the *contractual* Section 301(a) rights and remedies of the Charging Party Union and its members as to their 2017 and 2018 Christmas bonuses. The Board should withdraw its

Decision here and issue a new decision that retracts its holding that there is "only one plausible interpretation" of the contract on the issues here.

E. CONCLUSION AND REQUEST FOR RECONSIDERATION AND/OR CLARIFICATION

16. At a minimum, the Board should withdraw the Decision and retract its improper "contract interpretation" holdings here. The Board should clarify that it must accede to the jurisdiction of the courts under LMRA Section 301(a), since it is such courts that have the sole power to adjudicate suits for violation of labor agreements.

17. The Board should also understand that the arguments stated in detail in text here are made in order to ensure that they are preserved under NLRA Section 10(e), see *Woelke & Romero Framing, Inc. v. NLRB*, 465 U.S. 645, 665-66 (1982), should the final decision of the Board in this matter become the subject of review by a federal court of appeals under either Section 10(e) or (f). [5]

[5] Should the final decision of the Board in this matter become the subject of review by a federal court of appeals under either Section 10(e) or (f), arguments made to the court of appeals must have been raised before the Board. Here, the Respondent defended its actions under the "sound arguable basis" test (see Respondent's Brief to the ALJ, p. 2, arguing that absent union animus "the Board will not seek to determine which of two equally plausible contract interpretations is correct."). The Board majority, however, adjudicated this case by instead purporting to adopt a definitive contract interpretation. ("There are not two equally plausible interpretations here. There is only one plausible interpretation, and it favors the Respondent." Decision at 4.) This motion accordingly responds to the Board majority's error at the decisional stage, out of an excess of caution given Section 10(e) and *Woelke & Romero.*

WHEREFORE, the Charging Party Union's motion for reconsideration and/or clarification of the January 14, 2021 Decision and Order of the Labor Board in this matter should be granted. [6]

March 11, 2021 Respectfully submitted,

s/ Michael Nicholson

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[6] The Charging Party Union reserves all rights to maintain each of the arguments that were asserted before the Administrative Law Judge and/or the Board by the General Counsel as well as itself, including those adopted in the decision of the Administrative Law Judge and in the dissent of then-Board member McFerran, and incorporates all of the foregoing in this request for reconsideration and/or clarification. We accordingly also ask that the Board reconsider and adopt the findings, conclusions and remedies of the Administrative Law Judge, for the reasons found by her and for the reasons enunciated by Member McFerran.

Certificate of Service

The undersigned counsel hereby certifies that on March 11, 2021 he served the foregoing **CHARGING PARTY UNION'S MOTION FOR RECONSIDERATION AND/OR CLARIFICATION** upon each of the following by email to the addresses indicated for each:

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